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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 372

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, by its President, Henry Mida, Lodge No. 115 of the State Lodge, HOWARD HEINE and BERNARD L. DUGGAN,
Plaintiffs, Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan, LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan,
Defendants, Appellees and Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

PRELIMINARY STATEMENT

This is petitioners' second attempt to obtain a writ of certiorari in the United States Supreme Court to review the action of the Michigan Supreme Court sustaining the validity of a rule prohibiting membership by police officers

> The power in the city of complete control is imperatively necessary if discipline is to be maintained.' "

Many other inaccuracies in Petitioners' Statement of Facts could be detailed. We, therefore, believe that in fairness to the Court we should present a counter-statement of facts amply supported by the testimony and proofs offered in the case and sustained by the findings of fact contained in the opinions of the Trial Judge and the Michigan Supreme Court.

II.

COUNTER-STATEMENT OF FACTS

NOTE: The record on appeal consists of three volumes including Volumes I and II of Exhibits and unless otherwise clearly shown by the context, figures in parentheses refer to pages of the printed record.

The defendant, John H. Witherspoon, became Commissioner of the Detroit Police Department on June 1st, 1942. He soon thereafter learned of the existence of an Order issued June 5th, 1919, by former Commissioner Inches, prohibiting membership by police officers in the Fraternal Order of Police. He had occasion to discuss the Order with a number of his Commanding Officers and members of other Police Departments (380) and he also examined the contents of the F.O.P. file which was then in the Police Department (379). He did not in any way abrogate or modify the prohibitory Order.

On Thursday, January 28th, 1943, a group of Detroit police officers, under the leadership of Patrolman Howard Heine and Detective Bernard L. Duggan, arranged a dinner meeting at the Wardell-Sheraton Hotel, Detroit (99, Ex. Vol. II, p. 51). The meeting was attended by a number of police officers and some representatives of the Ham-

tramck, Michigan, Lodge of the F.O.P., the plaintiff, together with Henry Mida of the Dearborn Police Department, and President of the State Lodge F.O.P. (Ex. Vol. I, p. 298), and Ralph Nelson, a reporter of the Detroit Free Press (Ex. Vol. I, p. 304). The meeting was addressed by Mida, who as State President, told of the advantages of membership in the F.O.P. and urged the men to organize a Detroit Police Lodge (371, Ex. Vol. II, 51-52). A temporary organization was set up with Heine as temporary President and Duggan as temporary Secretary (Ex. Vol. II, 56, 300). The meeting attracted considerable public attention. On Friday, January 29th, Superintendent Berg was informed by a newspaper reporter that the F.O.P. was organizing the Police Department and he immediately notified the Commissioner (Ex. Vol. I, p. 68). They learned more about the organization from an article which appeared in the Detroit Free Press Friday night, January 29th. The article recited, among other things, the following:

> "In a five and one-half hour session held Thursday night behind closed doors in the Wardell Sheraton Hotel, Detroit Police Officers signified their intention of joining the National Order despite any possible executive or administrative protests."

Neither Commissioner Witherspoon nor Superintendent Berg knew anything about the efforts to organize the F.O.P. Lodge until the Superintendent receive the phone call from the newspaper reporter and they read the article in the Free Press.

Heine was summoned to Police Headquarters on Saturday morning, January 30th, and a meeting was had between him, Commissioner Witherspoon and Superintendent Berg (Ex. Vol. I, p. 310). A transcript of this meeting was received in evidence (Ex. 139, Ex. Vol. II, pp.

46-80). Heine related the circumstances surrounding the Thursday meeting but denied that he knew of the existence of the Inches' Order prohibiting membership in the F.O.P. until informed of its existence at this meeting (Ex. Vol. II, p. 66; Ex. Vol. I, p. 310). He admitted that he had been advised that the formation of the organization was contrary to the Orders of the Police Department (Vol. II, p. 61) but that he allowed himself to be elected President (Ex. Vol. II, p. 61). Heine was given the Inches' Order to read and he then informed the Commissioner that if the F.O.P. was permitted to organize in the Police Department he would join, but if not, he would not join and that he would pull out of the organization (Vol. II, 68-69). He also advised that no new meeting was contemplated and that the organization intended to present the matter to the Commissioner for permission to organize (Ex. Vol. II, 71).

Notwithstanding his statement to the Commissioner and Superintendent, that no further meetings were contemplated until the matter could be presented to the Commissioner, Heine left Detroit Police Headquarters and went directly to the Eagles Hall in Detroit (Ex. Vol. I, p. 312) where a secret organization initiation and election meeting was held (Ex. Vol. I, p. 313; Vol. II, 12). Heine was elected permanent President (Ex. Vol. I, p. 316) and Duggan Secretary (83).

On Monday, February 1st, 1943, Duggan was summoned to Police Headquarters where he was interviewed by Commissioner Witherspoon. A transcript of the meeting was received in evidence (Ex. 130, Ex. Vol. II, pp. 11-46). Duggan refused to reveal any information relative to the meeting held on January 28th, on the ground that the meeting was a secret meeting (Vol. II, 17-20). He knew of the rule prohibiting membership in the F.O.P. (Vol.

II, 22-23), but he joined nevertheless because he figured the rule was wrong and he was willing to be the guinea pig in a test case (Vol. II, 23-24). He admitted being on duty from eight to four that day and attending the meeting at three o'clock without permission to leave his work earlier (Vol. II, p. 44-46).

On February 2, 1943, misconduct charges were preferred against Heine, charging disobedience of rules and order of the Department; reporting falsely to a superior officer and insubordination. On the same day similar charges were preferred against Duggan, with the additional charge of being absent without leave. Both officers were ordered to appear before the Police Trial Board on February 5, 1943, to answer the charges (23-29).

The trial of Heine was held on February 5th, 1943, and that of Duggan was held on February 6th, 1943. At the trial of Heine Patrolman William Galahn testified (Exhibit 128, 95 through 128) that he was one of the officers that attended the January 28th, 1943 dinner, at which time he was elected temporary treasurer. He testified that he knew that Heine was to meet with Superintendent Berg on Saturday morning, January 30th, relative to the organization; that he went to the meeting to ascertain the result of Heine's conference with the Superintendent and "to find out if the organization had secured permission to start;" that Heine told Galahn: "He didn't tell me he had direct permission but he thought it would be permissible for him to go ahead; that he thought the way things looked, the Superintendent was going to give us an O. K." (Ex. 128, p. 99). Galahn testified further as follows:

> "Q. Now if Heine had told you he had received no permission but on the contrary was told that the organization was against the rules of the Depart-

ment * * * would you have joined the organization?

A. I would not" (Exhibit 128, 104 and 104-A).

At the hearings before the Trial Board neither Heine nor Duggan took the stand to offer any testimony in their own defense, nor did either one of them offer to withdraw from the Fraternal Order of Police. The findings of the Trial Board are contained on pages 121 through 124 of Exhibit 129.

The proofs were conclusive that both Heine and Duggan were guilty of flagrant insubordination. On Saturday morning, January 30th, 1943, Heine told the Commissioner and the Superintendent that no further meetings of the F.O.P. were contemplated while there was an Order in the Department prohibiting membership in the organization, and that nothing further would be done until the matter could be presented to the Commissioner in an orderly fashion for a change in the rule. Notwithstanding this conversation, Heine left police headquarters and went directly to the organization meeting of the local F.O.P., permitting himself to be initiated and elected permanent President, and when Patrolman Galahn asked Heine about the Saturday morning meeting with the Superintendent, he, Heine, told him everything was O. K. and that they were going to get permission to organize.

Duggan, who had been elected Secretary at the meeting of January 30th, 1943, was brought before the Commissioner the next Monday, on February 1st, 1943; he told the Commissioner that he believed the rule was wrong and that he was going to remain a member notwithstanding the rule. He made no effort to justify his conduct in leaving his duty and attending the meeting of the organization.

Both officers were found guilty of insubordination and dismissed from the Department.

On February 3rd, 1943, Commissioner Witherspoon promulgated Order No. 561 reaffirming the Inches' Order of 1919 prohibiting membership in the F.O.P. and giving his reasons therefor (63-66). From this point on the plaintiffs and adherents of the F.O.P. began a course of conduct having for its purpose the objective that the rule be abrogated. Highly inflammatory handbills and dodgers were passed out to police officers and posted on bulletin boards in police stations (Exhibits 101, 102, 104, 105, Vol I, 19 through 27). Henry Mida, State President, knew about the litigation involving the efforts of the F.O.P. to organize the police in Wyandotte and Lansing (177). Shortly after this suit was instituted he made a speech to the F.O.P. Lodge at Port Huron on February 7, 1943, in which he stated that "unless the (F.O.P.) gets a fair deal in Detroit, they could get 100,000 men and go and push the City Hall into the River" (Vol. I, 204). This speech was given wide publicity. The National organization of the F.O.P. put out an official bulletin in March 1943, and circularized Detroit's police officers with the same; portions of the exhibit (Exhibit 46, admitted in evidence as Exhibit 153) appear in Vol. II, p. 407 through 415. Heine was pictured as a martyr and given a salute for his insubordination. The same periodical contained the letter of resignation of Patrolman Fred P. Adams (Vol. I, p. 415). In this letter Adams referred to the hearing before Judge Harry Keidan as a "circus" and the procedure as a "mockery of justice."

While this case was being heard before Judge Keidan a similar case had theretofore been tried before Judge Leland W. Carr, at Lansing, Michigan, and had been appealed to the Michigan Supreme Court. The Lansing case differed from the Detroit case in that the rule in Lansing prohibited membership by Lansing police officers in the F.O.P. unless, 1st: that membership be restricted to rank

and file officers, and 2nd: that no outsiders be admitted as honorary or associate members. Judge Carr held that the rule was valid and did not violate any of the Constitutional rights of the Lansing police officers.

The decision of Judge Carr was affirmed by the Michigan Supreme Court on June 30th, 1943, and the opinion appears in 306 Mich. 68; 10 N. W. (2d) 310.

The F.O.P. represented by the same counsel appealing for petitioners in this case, then filed a petition for writ of certiorari in the United States Supreme Court alleging substantially the same claims asserted in this case, namely: that the rule was void because it deprived the petitioners of their Constitutional rights under (a) the due process clause of the fourteenth amendment to the Constitution, and (b) equal protection of the laws clause of the fourteenth amendent to the Constitution. (See Petition for Writ of Certiorari and Supporting Brief, p. 20.) Briefs in opposition to the petition for writ of certiorari were filed by attorneys for the City of Lansing and by the writer as attorney for the City of Detroit, *Amicus Curiae*. The petition was denied by the United States Supreme Court as hereinbefore related.

Subsequently Commissioner Witherspoon was succeeded by John F. Ballenger, the present Police Commissioner, who reaffirmed the order (289-290).

III.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Police Commissioner of the Detroit Police Department promulgated an order prohibiting membersip by police officers in the Fraternal Order of Police. An order was first made in 1919 by the then Commissioner and was never rescinded. It was reaffirmed by the Commissioner in 1943, who after a thorough investigation determined that membership by police officers in the organization was inimical to the public welfare.

1. Was the rule prohibiting membership in the F.O.P. a valid exercise of authority by the Police Commissioner?
2. Is the order reasonable where it appears that the history, past conduct and leadership of the organization and its purposes are inimical to public welfare?
3. Where the rule is a condition of employment does such rule deprive police officers of any rights under the Federal Constitution?

IV.

COUNTER-STATEMENT AS TO JURISDICTION

On page 19 of petitioners' brief, pettiioners set forth the reasons relied on for the issuance of the writ of certiorari. Petitioners claim that the Supreme Court of the State of Michigan has decided a Federal question not heretofore decided by this court. We insist that the question involved in this case has been decided by the United States Supreme Court in the following cases:

United Public Workers of America v. Mitchell, 91 L. Ed. 509;

Fraternal Order of Police, et al. v. D. D. Harris, et al., Petition for Certiorari denied by the U. S. Supreme Court, 321 U. S. 784; 74 Sup. Ct. 781; 88 L. Ed. 1076;

City of Jackson v. McLeod, Certiorari denied by United States Supreme Court, 328 U. S. 863; 90 L. Ed. 1633.

We point out in our argument that this case does not present a Federal question nor does it present a Federal question not heretofore decided by this Court.

V.

ARGUMENT

The claims of the petitioners may be grouped under two heads. First: That the order was void because it was unreasonable. Second: The order was void because it was unconstitutional.

(A)

THE RULE PROHIBITING MEMBERSHIP IN THE FRATERNAL ORDER OF POLICE WAS A VALID EXERCISE OF AUTHORITY BY THE POLICE COMMISSIONER

Title IV, Chapter XXI, Section 5 (a), (c) and (m), of the Detroit City Charter reads as follows:

> "Sec. 5. The powers and duties of the Commissioner, which shall be exercised and performed as herein provided, and in accordance with the laws of the state and the ordinances of the city, shall be as follows:
>
> (a) He shall assume and exercise supervision over the Police Department and make all proper rules for the government and discipline thereof;
>
> (c) Shall preserve the public peace and prevent crime, arrest offenders and protect the rights of persons and property, guard the public health, preserve order and enforce the laws of the state and the ordinances of the city;
>
> (m) Shall have such other powers as are herein prescribed or may be necessary hereunder for the proper discharge of his duties."

Under the authority vested in him by the City Charter to exercise supervision over the Police Department and make all proper rules for the government and discipline thereof, the Commissioner promulgated a rule prohibiting

membership by police officers in the Fraternal Order of Police.

Notwithstanding the claim on page 25 of the petitioners' brief that the Commissioner did not make any investigation before instituting the action complained of, there is ample evidence to prove that the Commissioner actually made an exhaustive and painstaking investigation. In his testimony before Judges Keidan and Ferguson, Commissioner Witherspoon recited the many reasons which prompted him to prohibit memberships in the F.O.P. He declared that the order was not issued for any one specific reason but was issued for all the reasons, including the history of its activities, its manner of operation, the methods pursued in attempting to force recognition in Detroit, the provisions of the constitution and by-laws, the practice of selling honorary and associate memberships and automobile emblems, and the experiences in other cities (421).

The record is replete with evidence of conduct of plaintiffs' leaders in attempting to organize, involving *inter alia* deliberate falsification, flagrant insubordination and threats of violence. As stated by Commissioner Witherspoon: "The whole campaign has been in open defiance of the very law and order that a police officer is sworn to maintain" (55). Again, where he stated:

> "I felt that the action of Mr. Heine and Mr. Duggan in their attempt to form the Fraternal Order of Police in the Detroit Police Department was tantamount to a strike against the Department. It got down to the question of whether or not the properly constituted authorities were going to run and control the Department, or whether it was going to be controlled by others. I think that is a fair outline for the reasons and for the promulgation of my order of February 3" (408).

The constitution provided for secret work, rituals and passwords. Dues of $12.00 per year were provided for; $1.00 of which was paid to the Grand Lodge; $1.00 to the State Lodge and $2.00 for a "kitty" described as a Legislative fund. The organization had engaged in questionable methods of raising money in various cities, all of these things were taken into consideration by Commissioner Witherspoon when he promulgated his order.

There is ample justification in this record for the statement of Commissioner Witherspoon, that:

> "The Witness: * * * I banned the Fraternal Order of Police because I thought, looking at the organization in itself, in its entirety, and its activities in the other communities, their manner in attempting to organize in the Police Department—I did not look at it particularly because of this reason or that reason or the other reason. I have listed various things that I thought objectionable features of the organization which, put together, made it appear to me to be an undesirable one for the Detroit Police Department and the citizens of Detroit" (Record p. 458).

Lieutenant Kenneth R. Dickinson told about the complete breakdown in the enforcement of parking regulations in Indianapolis, because too many motorists were displaying the F.O.P. emblems and were being favored by their brother-members of the F.O.P. (Ex. Vol I, p. 252).

With this background there is no room for dispute as to the authority of the Commissioner to make the rule complained of.

In the case of *City of Jackson v. McLeod,* (1946, Miss.), 24 So. (2d) 319 (Certiorari denied U. S. Supreme Court, 328 U. S. 863, 90 L. Ed. 1633 an order was adopted "that no policeman in the city shall be a member of a labor

union," and that "any policeman who did not resign his connection with any labor union by noon of June 19, 1944, would be dismissed." A number of policemen declined to obey the order and they were discharged accordingly. They had a hearing before the civil service commission of the city and the commission sustained the discharge upon grounds of insubordination and acts tending to injure the public service. An appeal was taken to the state Circuit Court as provided by the civil service statute and judgment was rendered for petitioners. The city appealed and in reversing the judgment of the lower court it was said, commencing on page 321:

> "This case does not involve in any way the merits or demerits of labor unions when confined to private employment. In their place, outside of governmental agencies, their merits are fully conceded. It was as to their place when city policemen are involved that the civil service commission was here concerned and it is that only with which the court is concerned. And here it is to be remembered, and well noted, that a civil service commission, in its administration, is not solely a fact finding body, it is charged, as the supervising agent of the city, and within the province committed to it, with the essential discretion which must be invested in such a body in the matter of what is good policy in city employments, and in the conduct of city employees according to the character of the duties to be performed by the particular employees under consideration.
>
> It ought to be conceded by everybody that while a city policeman must perform his duties with courage and intelligence, he must do so without favoritism. Nothing could be more unbecoming to a police department than that it shall be pledged, or otherwise committed in an obligatory manner, to a preference of one group over another when all are paying their salaries, and particularly is this true when the groups are such that disputes between them are

liable to arise, which in turn may lead to disorders. And inasmuch as the City Council is elected by the people and made responsible to the people for the proper conduct of every department of the city government, the police employees must be responsible to the council and must be under its direction, free from the obligation of any other allegiance whatsoever, so far as their activities as policemen are concerned. And to fully implement this requirement, it is expressly enacted by Section 3803, Code 1942, that the City Council under the commission form of municipal government 'shall also have power * * * to make all needful rules and regulations for the government of the officers and employees of said city; to enforce a strict observance thereof, and to change the same when deemed necessary.'

"In *Fraternal Order of Police v. Lansing Board of Commissioners,* 306 Mich. 68, 10 N. W. (2d) 310, 312, the latest case on the subject, it is said: 'Police and fire departments are in a class apart. Both are at times charged with the preservation of the public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained,' quoting from *Carter v. Thompson,* 164 Va. 312, 180 S. E. 410. In *Hutchinson v. Magee,* 278 Pa. 119, 122 A. 234, that court said: 'It is generally conceded that association with any organization, which on any occasion or for any purpose, attempts to control the relations of members of either police or fire departments toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare. * * * If plaintiffs desired to retain their positions in the public service, they should have obeyed the director's order; having elected not to do so (which, of course, was the privilege of each of them,

> as individuals), they cannot successfully complain on the ensuing results.' See also *McNatt et al. v. Lawther,* Tex. Civ. App., 223 S. W. 503; *San Antonio, etc., Local Union v. Bell,* Tex. Civ. App., 223 S. W. 506; *Brownell v. Russell,* 76 Vt. 326, 57 A. 103; and *McAuliffe v. City of New Bedford,* 155 Mass. 216, 29 N. E. 517. No case to the contrary of these holdings, when carefully examined, has been cited by appellee."

In the *McNatt v. Lawther* case, 223 S. W. 503 (Texas) prohibiting firemen from joining the local union, we repeat what the court said:

> "We are not called upon to express an opinion as to whether such rules were wise or not. We do conclude, however, that we cannot say that the adoption and enforcement thereof by the constituted authorities of the city was arbitrary or capricious."

We submit that the following well established legal principles are applicable to determine the validity of the rule prohibiting membership:

(a) The police head may pass a rule prohibiting membership in an organization which he believes is inimical to or conflicts with police duties;

(b) Courts will not pass upon the wisdom of the rule and substitute its judgment for that of the police head;

(c) To hold the rule invalid the court must find that there was no authority for its adoption and that the action of the police head was arbitrary and capricious.

There is no justification for the claim asserted on pages 21 through 28 of petitioners' brief, that the order prohibiting membership by police officers in the Fraternal Order of Police is unreasonable and, therefore, void.

We submit that upon this record that the order was not only reasonable but that under the facts in this case it was the duty of the Police Commissioner to promulgate such order.

(B)

NO CONSTITUTIONAL RIGHTS HAVING BEEN INVADED THERE IS NO FEDERAL QUESTION INVOLVED

Petitioners insist that the order prohibiting membership by police officers in the F.O.P. violates (a) petitioners' right of assembly as guaranteed by the Fourteenth Amendment to the Constitution of the United States; (b) deprives petitioners of property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States; (c) denies petitioners the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The answer to the charge that the rule is violative of Constitutional rights is found in the opinion of Justice Holmes in *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 29 N. E. 517, cited with approval in the case of *Public Workers of America v. Mitchell,* 91 L. Ed. 509. The petitioner had been discharged for violation of a Police Department rule prohibiting the soliciting of money for political purposes. The discharged officer claimed that the rule was invalid as invading his right to express his political opinions. In upholding the constitutionality of the rule Justice Holmes said:

> "One answer to this argument, assuming that the statute does not make the mayor the final judge of what cause is sufficient, and that we have a right to consider it (*Ham. v. Board of Police,* 142 Mass. 90, 95, 7 N. E. Rep. 540; *Osgood v. Nelson,* L. R. 5 H. L. 636, 649) is that there is nothing in the constitution or the statute to prevent the city from attaching

obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

In the case of *Christal v. Police Commissioner of San Francisco,* 33 Cal. App. (2d) 564, police officers had refused to testify before a Grand Jury. Police rules required them to testify. They were dismissed because of the violation of this rule. The court in sustaining their dismissal held:

"* * * Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. (*McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 29 N. E. 517). * * *

"There is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that the exercise of such rights and privileges may be inconsistent with the performance of the duties of his office or employment. One of the most

cherished rights guaranteed by the Constitution is that of freedom of speech, yet no one would maintain that a police officer could fully exercise that right without violating the duties imposed upon him by the acceptance of his employment as a police officer. The right of freedom of speech might be relied upon by a police officer who had disclosed, to persons conducting an illegal establishment, information concerning the plan of the police department to conduct a raid upon such establishment, but the furnishing of such information would be inconsistent with and violative of the duties of such police officer. Such conduct would constitute cause for dismissal with or without any specific rule on the particular subject, and in the event of the adoption of a rule providing for dismissal of any officer making such disclosure, the claim that such rule violated any constitutional right of the officers would be clearly untenable. * * * The adoption of the rule and the amendment above mentioned did not impose any new duties upon the members of the department, and the adoption thereof did not operate to deprive any member of the department of the right to exercise his constitutional privilege. That privilege still existed, and was exercised by appellants. The rule is not, therefore, subject to attack upon constitutional grounds. What appellants have attempted to do is to claim an alleged right to continue as police officers despite a violation of their duties as such officers. It seems clear that they had no such right."

To sustain their proposition that the rule is violative of the rights of free speech and peaceable assembly, petitioners cite a number of cases in which this court pointed out what has now become known as the "clear and present danger" rule, and petitioners insist that in order to sustain the validity of the rule involved in this case the Police Commissioner must show that there was such a

"clear and present danger" that would warrant the adoption of this rule.

There is no justification for invoking the "clear and present danger" test in this type of case. The reasonableness of rules and regulations prohibiting policemen from belonging to organizations is not to be tested by the "clear and present danger" rule for the obvious reason that this rule has no application except to persons in general in the exercise of *their* individual constitutional rights as to free speech and assembly. The rule has no application to the government as an employer in determining what reasonably may be required of its employees in furtherance of the public service.

If, as a condition of employment, the public agency imposes a rule reasonably calculated to promote the efficiency of public service but which restricts activities of its employees which are guaranteed to all persons under the organic law, the constitutional right of the individual is not impaired as he is still free to exercise all of his constitutional rights. He is not restrained in his right to engage in the activities prohibited by the rule. The only consequence of such act is to make him subject to dismissal from the public service, a service which he voluntarily undertakes and which he may with equal freedom elect to terminate.

In the recent case of *Perez v. Board of Police Commissioners of the City of Los Angeles,* decided March 20th, 1947, 178 Pac. (2d series) 537, the court in disposing of the objection to a rule prohibiting membership in a Police Union stated:

> "A consideration of the briefs herein and of the oral argument as well, reveals that, although appellant over all argument sings the praises of the constitution on the one hand nevertheless, it presages

its destruction on the other. Notwithstanding the fact that the named defendants are individuals and make up the Police Commission of the City of Los Angeles, actually, the suit herein is against the people. It disputes the power of the people to establish and conduct the government, for it seeks to control governmental processes by indirection. For example, in the oral argument appellants stated, 'It is our contention that the nature of this organization is such that it will promote efficiency and make for better police officers.' It is common knowledge that the people have sought no assistance from the labor union referred to herein, or any other organization. And, permission by public officials to establish such an affiliation would be a direct violation of the constitution, the effect of which would, in turn, defeat the will of the people. It should be emphasized that the scheme of government basically is created by the constitution; it is the source of government. Offices and agencies are established; powers are authorized; duties are imposed on individuals and governmental agencies, all for the purpose of carrying out the will of the people. All public officials, whether national or state, executive, administrative or judicial, and all public employees, are public servants. There is but one master, the people. Hence, the common expression that, 'This is a government of laws and not of men.' The allegiance of all public servants is to the people; obviously there can be neither alienation or division of this allegiance if constitutional government is to continue. The police commission, therefore, not only had the power but it was a manifest duty to adopt and enforce the resolution herein considered. The failure to do so in effect would have amounted to a surrender of power, a dereliction of duty, and a relinquishment of supervision and control over public servants it was their sworn duty to supervise and direct.

Conditions of public employment are determined and established by the people, either directly

> through the medium of the constitution, or indirectly, by vesting power and authority in governmental agencies or offices for such purposes. For example, section 18 of Article VI of the state constitution provides that, 'The justices of the supreme court, and of the district courts of appeal * * * shall be ineligible to any other office or public employment than a judicial officer or employment during the term for which they shall have been elected or appointed.' Manifestly, the acceptance of such a position results in the surrender of certain liberties. The people however are concerned with the public good and not with the ambition or desires of the individual, and conditions of public employment are determined accordingly. In this process of state government there is no conflict with the will of the people as expressed in the federal constitution."

In the recent case of *United Public Workers of America v. Mitchell,* 91 L. Ed. 509, upholding the Hatch Act, 18 USCA Sec. 61 (h) and 61 (o), which prohibited certain political activities of Federal employees, the United States Supreme Court held that such restrictions did not infringe upon the First Amendment guaranteeing freedom of speech or the rights reserved to the People by the Ninth and Tenth Amendments and did not constitute a denial of due process guaranteed by the Fifth Amendment. After declaring that the question of the need for such regulation is for other branches of government rather than the courts, Mr. Justice Reed said at page 523:

> "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."

In the footnote (pp. 522-3), the statement of Judge Holmes *(McAuliffe v. Mayor, supra)* heretofore referred to was cited with approval.

The Court further stated on page 524:

> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

In the dissenting opinion of Mr. Justice Douglas, it was pointed out that the restrictions of political activities as contained in the Hatch Act were too broad when imposed upon employees who were not in the administrative category of civil service. Mr. Justice Douglas said at page 535:

> "So, I think that if the issue tendered by Poole were tendered by an administrative employee, we would have quite a different case."

We believe that even under the tests outlined in this dissenting opinion, the prohibition would have been declared valid.

The rule in the instant case was made applicable to police officers. Courts have time and again declared that police departments are quasi military organizations and that police officers are in a class apart. Their duties, responsibilities and powers cannot be classed with those of an industrial worker of the government. Certainly with the background presented by the facts in this case, there was a "clear and present danger" to discipline and morale in the Detroit Police Department that compelled and justified the enactment of the rule complained of.

It is respectfully submitted that enforcement of the rule does not invade the constitutional rights of the petitioners.

VI.

CONCLUSION

Affiliation by police officers with an organization that exerts outside influence is incompatible with the welfare of the public. Membership in an organization that provides for National organizers, secret rituals, the sale of honorary and associate memberships, must always present a danger to discipline and morale in a Police Department. The rule limiting or restricting the right of a police officer to join an organization, the membership of which might interfere or conflict with his duties as a police officer and his loyalty to the people he serves, has long represented the policy of well regulated police departments. It is a rule that forms an integral part of the contract of employment of the officer. He knows when he joins the force he may not be able to join an organization with secrets and rituals, with national officers and organizers demand-

ing obedience to orders and with outsiders as honorary and associate members. The people of the community have a right to the enforcement of this rule. If they want the rule changed, they have the power to change it. Until that time there should be no interference by the courts or disobedience by the officers.

VII.

RELIEF SOUGHT

We respectfully ask that the petition for writ of certiorari be denied.

Respectfully submitted,

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